Supreme Court, U.S.
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SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 85-1294

EUGENE A. LEBER, ET AL.,

Petitioners,

V.

STEVEN A. SMITH, ET AL.

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To The United States Court of Appeals
For The Sixth Circuit

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STATEMENT OF THE CASE

The evidence adduced in the District Court, fairly given in the light most favorable to petitioners, shows that at approximately 4:30 a.m. on the morning of April 7, 1979 respondent Steven A. Smith, a deputy with the Erie County, Ohio Sheriff's Department, received a radio dispatch of a possible suicide at petitioners' house.

When Smith and a fellow deputy sheriff named Barrett arrived at the Leber house they were met by Richard Leber, who informed Smith and Barrett that his brother, petitioner Eugene Leber, had just left the Leber residence in his automobile. Richard Leber wanted his brother apprehended and brought home because in a conversation with Eugene Leber a few minutes earlier Eugene Leber had said something about contemplating suicide. Although Eugene Leber did not actually use the phrase "commit suicide", his brother was afraid that that was his intention.

Petitioner Eugene Leber admitted in deposition that prior to the accident he had treated with his family doctor for a nervous condition and had visited

a psychiatrist on one occasion. Eugene Leber also admitted that during the evening and early morning hours of the night in question he had conversations both with his brother, Richard, and with his ex-girlfriend that led them to believe that he might be going out to "do something" to himself. Leber further admitted that prior to the incident in question he had been drinking.

Richard Leber did not tell the two sheriff deputies that his brother had been drinking or was intoxicated; however, Smith inferred that Eugene Leber had been drinking and may have been intoxicated as his brother was and Smith surmised that Eugene and his brother had been to the same party.

Shortly after the conversation with Richard Leber, Deputy Smith and Barrett, in separate vehicles, spotted Eugene Leber operating his automobile along a rural county road. Leber knew that the deputies wanted to question him and attempted to evade them. A high speed chase involving speeds of up to 75 m.p.h. ensued until Eugene Leber brought his vehicle to a stop in front of a partial roadblock.

Barrett brought his police vehicle to a stop behind the Leber auto and shined a spotlight on it. Smith

positioned his police vehicle adjacent to and slightly behind Leber's car and got out drawing his revolver.

Although Leber was ordered on at least two occasions to get out of his vehicle he did not do so.

Smith testified by way of affidavit and deposition that he drew his revolver as a precaution because of the high speed pursuit, the report that Leber was suicidal, because it was dark and he could not fully see what Leber was doing inside the vehicle, and because he figured that no one's life meant very much to a person who might be suicidal and he wasn't sure whether Leber had a gun or other weapon.

While moving around the front of his vehicle Smith, who was holding his revolver uncocked and pointing upward, slipped and fell causing the weapon to discharge.

There was no dispute by any of the parties as to the Magistrate's finding that:

> "... Smith did not intend to fire his weapon at the plaintiff. As he exited the car, it was not aimed at the plaintiff, and, but for Smith's slipping on the ice, the pistol would not have fired."

On April 29, 1983 the motion of respondents for summary judgment was granted by the District Court and the complaint was dismissed. The District Court

held that the accidental discharge of the gun by Smith did not deprive plaintiff of any constitutional rights.

On June 24, 1983 petitioners filed a complaint in the Erie County Court of Common Pleas based upon the same incident and involving the same parties.

The order of the District Court granting summary judgment was affirmed by the U.S. Court of Appeals for the Sixth Circuit on September 20, 1985. The Court of Appeals noted in its decision that while such appeal was pending petitioners had received a jury award in the state court action in excess of $10,000,000.00, Leber vs. Smith, 773 F.2d 101 (1985) at pages 103-104.

SUMMARY OF ARGUMENT

A writ of centiorari should be denied because the petition does not set forth any special and important reasons for review. Specifically, the Court of Appeals did not decide an important question of federal law which has not been but should be settled by this Court nor did it decide a federal question in a way in conflict with any applicable decision of this Court. Petitioners' contentions that the Court of Appeals failed to consider the totality of the circumstances in testing the reasonableness of respondent Smith's activities at the time of the accident and that the Court of Appeals erred in failing to view the evidence in the light most favorable to petitioners are incorrect. Review of such alleged errors by this Court would not resolve issues of public importance. In addition, such alleged errors are also moot in view of this Court's recent decisions holding that negligent activities of state officials do not give rise to a 42 U.S.C. §1983 action.

ARGUMENT

Review on writ of certiorari is not a matter of right. Such review is within this Court's judicial discretion. A writ will not be granted unless petitioners can show that there are special and important reasons for review. The special and important reasons for which this Court will usually entertain review on certiorari are set forth in Supreme Court Rule 17.

Of the reasons ennumerated in Rule 17, this petition only colorably implicates the reasons contained in Rule 17.1(c) which states in relevant part that the court may exercise its judicial discretion to grant review:

> "When . . . a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court."

I. ANY IMPORTANT QUESTIONS OF FEDERAL LAW HAVE NOW BEEN DECIDED BY THIS COURT

Petitioners have not articulated a claim that the Court of Appeals ruling in this case decided an important question of federal law which has not been but should be settled by this court. In the event that

this is the basis upon which petitioners seek review, two companion cases recently decided by this court, in factual settings almost identical to this case, clarify that any important questions of federal law decided by the Court of Appeals have now been settled by this court. In Daniels vs. Williams, 54 U.S.L.W. 4090 and Davidson vs. Cannon, 54 U.S.L.W. 4095, decided January 21, 1986, both petitioners, who were prison inmates, brought §1983 actions for personal injuries they had received due to the negligence of prison officials, alleging that such officials deprived them of a liberty interest secured by the Due Process Clause of the Fourteenth Amendment. In both cases this Court held that no cause of action may be maintained under §1983 for negligent infliction of personal injuries by a state official.

This court has now clarified that negligent conduct on the part of state officials does not give rise to a §1983 action for personal injuries:

> "In Daniels, we held that the Due Process Clause of the Fourteenth Amendment is not implicated by the lack of due care of an offical causing unintended injury to life, liberty or property. In other words, where a government official is merely negligent in causing the injury, no procedure for compensation is constitutionally required. * * * As we held in Daniels, the

> protections of the Due Process Clause, whether procedural or substantive, are just not triggered by lack of due care by prison officials." Davidson, supra, at 4095-4096.

While neither Daniels nor Davidson alleged that their injuries were sustained in violation of their Fourth Amendment rights as has petitioner Eugene Leber, the Daniels and Davidson cases demonstrate that petitioners in this case improperly brought a §1983 action notwithstanding the allegation of a Fourth Amendment deprivation. Fourth Amendment rights are only enforceable against the states by reason of the Due Process Clause of the Fourteenth Amendment. Wolf vs. Colorado, 338 U.S. 25, 69 S. Ct. 1359, 93 L.E. 1782 (1949). This Court has now established that the protections of the Due Process Clause, whether procedural or substantive, are simply not triggered by lack of due care on the part of state officials. Since a Fourth Amendment claim against state officials depends upon the protections afforded by the Due Process Clause, it follows that a negligent violation of the Fourth Amendment also does not give rise to a §1983 action.

Because this Court has now settled an important question of federal law by holding that mere negli-

gence on the part of state officials does not trigger a cause of action under §1983, which question had not been addressed by this Court at the time the Court of Appeals ruled on this case, review on certiorari is inappropriate.

II. THE COURT OF APPEALS DID NOT DECIDE A FEDERAL QUESTION IN CONFLICT WITH AN APPLICABLE DECISION OF THIS COURT

The primary basis for certiorari review asserted by the petition is that the Court of Appeals decided this case in conflict with an applicable decision of this Court. The allegedly applicable decision of this Court with which petitioners allege the Court of Appeals decision conflicts is Tennessee vs. Garner, 471 U.S. __, 105 S. Ct. 1694, 85 L.Ed.2d 1 (1985).

Garner, however, is neither a decision applicable to the facts or law involved in the instant case nor is the Court of Appeals decision in conflict with it. Garner decided the constitutionality of a Tennessee statute permitting intentional use of deadly force in apprehending a suspected felon and held that a police officer violates a suspected felon's Fourth Amendment rights by using deadly force unless the

officer has probable cause to believe that the suspect either poses a threat to the safety of the officer or a danger to the community if left at large. The present case involves no statute. Nor does it involve an intentional shooting. All of the parties concede that the shooting of Eugene Leber was an unintended accident.

Based upon the foregoing, this Court should deny review on certiorari as the Court of Appeals decision was not in conflict with any applicable decision of this court.

III. ALLEGED ERROR BY THE COURT OF APPEALS

The petition asserts two subsidiary reasons why this Court should review this case on certiorari: (1) That the Court of Appeals, in testing the reasonableness of Deputy Smith's activities at the time of the shooting, did not consider the totality of the circumstances; and (2) That the District Court and the Court of Appeals erred to the prejudice of petitioners by failing to view the evidence adduced in the light most favorable to them.

Respondents contend that these two instances of alleged error should not be addressed by the Court on

certiorari review because: (1) there was no such error; (2) such alleged error involves matters of interest only to the parties; and (3) such alleged error was rendered moot by the Daniels and Davidson decisions.

A. THE COURT OF APPEALS DID NOT ERR

1. ALLEGED ERROR IN FAILING TO CONSIDER THE TOTALITY OF THE CIRCUMSTANCES

With respect to petitioners' claim that a special and important reason for review by this Court results from the alleged error of the Court of Appeals in failing to consider the totality of the circumstances, it should be noted that both the District Court and the Court of Appeals reached the same result (that petitioners' complaint was properly dismissed) via slightly different reasoning. The District Court, following Mills vs. Smith, 656 F.2d 337 (8th Cir., 1981) and Polson vs. City of Lee's Summit, 535 F. Supp. 555 (W.D. Mo. W.D., 1982), held that since the shooting of Leber was accidental or at most the result of mere negligence, Leber's Fourth Amendment rights were not violated. The District Court held that a higher

mental state of culpability was required to implicate the Fourth Amendment. The approach of the Court of Appeals was to test the activities of Smith to determine whether his actions were "unreasonable". While respondents asserted in the lower courts that the reasoning of the District Court was most appropriate, the difference in approach taken by the trial court and the Court of Appeals is immaterial since the result was properly the same under either analysis.

If the reasoning of the District Court was correct, the amended complaint was properly dismissed as petitioners cannot seriously contest that the evidence, even viewed in the light most favorable to them, showed, at the very most, mere negligence on Deputy's Smith's part. On the other hand, if the Court of Appeals was correct in assessing the Fourth Amendment aspects of Smith's conduct on the basis of whether or not the activities were "unreasonable", the record fully supports the Court of Appeals' finding that his actions were reasonable as a matter of law.

Petitioners assert that the Court of Appeals erred in testing the reasonableness of Smith's conduct

by considering such conduct only up until the moment Smith pulled his uncocked handgun. According to petitioners, assessment of the totality of the circumstances should have included Smith's activities during the second or two between when Smith drew his weapon and when he slipped and fell.

Stripped down to its bare essentials, petitioners' contention is that the Court of Appeals erred in failing to consider whether Smith's approach to Leber's car was reasonable. In view of the fact that the roadway ahead was only partially obstructed by a police roadblock and that Smith's purpose in briskly moving toward the Leber vehicle was to prevent, as quickly as possible, Leber's eluding the officers once again by driving away, it is difficult to comprehend how Smith's haste in reaching the Leber vehicle raised a jury issue as to reasonableness. In fact, since no one can fairly say that Smith would not have stumbled even had he adopted a slower and more deliberate approach, the speed of his movement was simply not relevant to any of the issues in this case.

Moveover, a careful review of the Court of Appeals decision does not show, as petitioners contend, that

the Court of Appeals failed to consider the reasonableness of Smith's activities in the brief moment after he drew his gun before it discharged. While the Court may have focused upon Smith's decision to draw his gun, it recognized that, "The issue we must address . . . is whether Deputy Smith's actions were 'reasonable' under the Fourth Amendment." Leber, supra, at page 105 (emphasis supplied).

2. ALLEGED ERROR IN FAILING TO CONSIDER THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO PETITIONERS

The final basis contended by petitioners as providing a special and important reason for this Court's exercise of discretion to review this case is that the trial and appellate court erred in failing to view the evidence in the light most favorable to petitioners by picking and choosing only the facts which were favorable to respondents.

As evidence of this alleged improper fact finding, petitioners assert that the Court of Appeals improperly characterized Eugene Leber as intoxicated (Petition, page 23). An examination of the opinion of the Court of Appeals will reveal that it did not

characterize Leber as intoxicated. The original opinion referred to Smith's deposition testimony that Smith "drew his gun because the actions of an emotionally disturbed, possibly suicidal, intoxicated person are unpredictable", Leber, supra, at page 105. The Court of Appeals, far from characterizing Leber as intoxicated, quite properly focused upon what Smith thought to be Leber's condition. Moreover, after petitioners' petition for rehearing and rehearing en banc was denied the panel modified its opinion by eliminating the reference to Leber's intoxication.

Next, petitioners assert that the Court of Appeals improperly found Leber to have been emotionally disturbed and possibly suicidal (Petition, page 23). Again, the Court of Appeals made no such finding nor was it required to since Leber's mental state was not relevant. The Court of Appeals very correctly focused upon what Smith reasonably thought Leber's mental state to be at the time of the incident.

Finally, petitioners contend that the Court of Appeals failed to consider the affidavit of petitioners' expert introduced into evidence in the trial court which contained conclusory statements concerning

the quality of Smith's actions and his mental state at the time of the incident.

The District Court properly granted summary judgment notwithstanding the affidavit. The affidavit did not raise any material issues of contested fact. Moreover, the District Court could properly disregard the opinions expressed in the affidavit either because they were excludable under Rule 702 of the Federal Rules of Evidence as not requiring scientific, technical, or other specialized knowledge to assist the trier of fact, or because the expert's opinions were entitled to no evidentiary weight since the opinions invaded the province of the trial court to decide legal issues.

B. THE ALLEGED ERROR OF THE COURT OF APPEALS INVOLVED MATTERS OF INTEREST ONLY TO THE PARTIES

Any error of the Court of Appeals which petitioners have put forward to this Court as a basis for review on certiorari involves matters of interest only to the parties. This court has long been:

> ". . . consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the

public as distinguised from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeals." Layne and Bowler Corp. vs. Western Well Works, Inc., 261 U.S. 387, 43 S. Ct. 422, 67 L. Ed. 712 (1923); followed and approved in Rice vs. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 75 S. Ct. 614, 99 L. Ed. 897 (1955).

C. ANY ERROR OF THE COURT OF APPEALS IS NOW MOOT

Certiorari would be particularly inappropriate in this case, since the alleged error of the Court of Appeals in failing to consider the totality of the circumstances and evidence favorable to petitioners has now been rendered moot by Daniels and Davidson.

The evidence adduced in the District Court demonstrated that the shooting of Eugene Leber, was, at most, the result of mere negligence. The Court of Appeals focused upon whether the activities of Deputy Smith were "unreasonable" under the Fourth Amendment, when it need only have determined whether the District Court's finding of mere negligence was supported by the evidence. Since even petitioners do not challenge the trial court's finding of negligence, the Court of Appeals analysis of

whether Smith's activities were reasonable was superfluous.

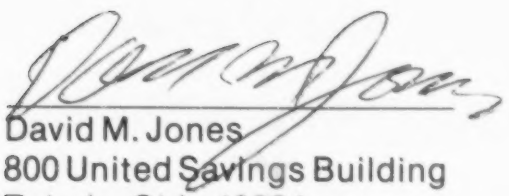
Accordingly, even if the Court of Appeals improperly failed to consider the totality of the circumstances and certain evidence favorable to petitioners, such error is moot.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

EASTMAN & SMITH



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CERTIFICATION

I hereby certify that three copies of the foregoing Brief of Respondents in Opposition to Petition for Writ of Certiorari were served upon counsel for petitioners by sending same by ordinary mail, postage prepaid, on the 27 day of February, 1986, to:

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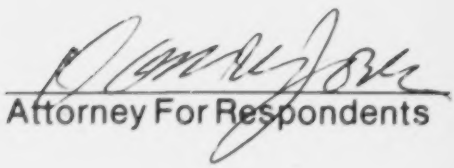

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